No. 73-1048

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

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SUPREME COURT, U.S.

JOHN LEE BOEHM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO
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THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Following a jury trial in the United States District Court for the Southern District of California, petitioner was convicted of having smuggled marijuana into the United States from Mexico (count 1), having concealed and facilitated the transportation of marijuana knowing it to have been illegally imported (count 2), and having illegally possessed depressant and stimulant drugs (count 3), in violation of 21 U.S.C. (1964 ed.) 176(a) and 331(q)(3)(B). He was sentenced to concurrent terms of seven years' imprisonment on counts 1 and 2 and to five years' probation on count 3.

On June 15, 1972, the court of appeals affirmed per curiam (437 F.2d 347). This Court thereafter granted a petition for a writ of certiorari (413 U.S. 915), vacated the judgment of the court of appeals, and remanded the case for further consideration in light of Almeida-Sanchez v. United States, 413 U.S. 266. On remand, the court of appeals again affirmed petitioner's conviction (Pet. App. A).

1. The essential facts are set forth in the opinion of the court of appeals (Pet. App. A, p. 1). While traveling north on California State Highway 86 in his camper truck, petitioner was stopped at a permanent Border Patrol immigration checkpoint located on Highway 86 approximately 36 air miles and 49 highway miles north of the Mexican border. During a routine search of the camper truck for illegal aliens, Border Patrol officers discovered marijuana and depressant and stimulant drugs in the vehicle. Petitioner's pre-trial motion to suppress the evidence resulting from this search was denied by the district court.

Following conviction, petitioner argued on appeal that the search of his vehicle and the seizure of the marijuana were unlawful. The court of appeals, however, summarily rejected the claim, stating that "[t]he search and seizure were plainly lawful" (437 F.2d at 348). The petition for a writ of certiorari to review that judgment of affirmance was held by this Court pending its decision in Almeida-Sanchez v. United States, supra, in which the Court ruled that a warrantless "roving patrol" search of an automobile for concealed aliens, conducted by Border Patrol officers acting without probable cause or reasonable suspicion to believe that the vehicle contained any aliens present in this country unlawfully, violated the Fourth Amendment's prohibition against unreasonable searches and seizures, and that the evidence seized as a result of the search must be excluded at trial.

On remand, the court of appeals, sitting en banc, again affirmed petitioner's conviction, setting forth its

reasons in a lengthy two-part opinion. In Part I, the court held by a 7-6 vote (1) that, since "Almeida-Sanchez is as applicable to fixed-checkpoint searches as to roving-patrol searches" (Pet. App. A, Part I, p. 10), evidence seized in a warrantless, non-probable-cause, checkpoint search of an automobile for aliens must be suppressed under the principles of Almeida-Sanchez unless it can be said to be the "functional equivalent" of a border search; and (2) that "the search is a functional equivalent of a border search" only if it "takes place at a location where virtually everyone searched has just come from the other side of the border" or if it can be said with "reasonable certainty" either that the contents of the vehicle were aboard when the vehicle crossed the border or, if the vehicle has not itself crossed the border, that the persons or things in it recently entered or were brought into this country illegally (id. at 6-8).

In Part II, the court held that the principles of Almeida-Sanchez, as applied to searches at fixed checkpoints, created a new constitutional rule that should not be applied retroactively to searches that occurred prior to June 21, 1973, the date of this Court's decision.[1/] Since the search in the present case occurred prior to June 21, 1973, the court held

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1/ On the same day, the court of appeals held 7-6 in United States v. Peltier, C.A. 9, No. 73-2509, that, as applied to roving patrol searches, Almeida-Sanchez did not create a new constitutional rule and that the principles of that decision "should be applied to similar cases pending on appeal on the date the Supreme Court's decision was announced" (slip op. 1). We have filed a petition for a writ of certiorari to review the court of appeals' judgment in Peltier (No. 73-2000).

that petitioner's motion to suppress was correctly denied.[2/]

2. Petitioner gives three reasons in support of his contention that he should be given the benefit of the new rule established by the court of appeals in this case. First, he contends that Almeida-Sanchez should be applied retroactively in all cases, because that decision did not overrule any prior decision of this Court (Pet. 11-13). Second, he argues that, to avoid "grave injustice" (Pet. 9), Almeida-Sanchez should be applied retroactively at least "to cases pending on direct review at the time the decision was rendered" (ibid.) and in which the appellant had properly preserved the issue (Pet. 7-10).[3/] Third, he contends that the new rule announced by the court of appeals in the present case -- that Almeida-Sanchez extends to fixed checkpoint searches -- must be applied to petitioner in order "to meet the case or controversy requirement of Article III" and to assure that "the decision outlawing these checkpoint searches" amounts to more than "mere dictum" (Pet. 10).

2/ The majority opinion in Part II represented the views of seven judges. Four other judges concurred in the holding that the new rule should apply only to searches conducted after the date of the decision in Almeida-Sanchez, but they would have ruled that petitioner himself, "as the moving party in the case in which this new rule has been announced * * * is fully entitled to its protection" (Pet. App. A, Part II, opinion of Judge Goodwin, p. 2). Two judges dissented on the ground that Almeida-Sanchez created no new rule for retroactivity purposes (Pet. App. A, Part II, opinion of Judge Hufstedler).

3/ As petitioner correctly points out (Pet. 7), the Tenth Circuit has so held in United States v. King, 485 F.2d 353, and United States v. Maddox, 485 F.2d 361. Those decisions, which also involved checkpoint searches, thus conflict with the decision of the court of appeals in the present case.
(footnote cont'd)

There is, in our view, a threshold question: whether the court of appeals correctly concluded that the principles of Almeida-Sanchez require the suppression of evidence seized in a warrantless checkpoint search. If that part of the decision was incorrect -- that is, if prior judicial approval is not essential to the conduct of limited searches of automobiles for aliens at fixed checkpoints -- then there is no need to consider petitioner's retroactivity argument, which necessarily presupposes that Almeida-Sanchez applies to checkpoints. In those circumstances, the court of appeals' judgment of affirmance would be correct for reasons other than those stated in its opinion.

The issue whether Almeida-Sanchez applies to checkpoint searches is before this Court in the government's petition for a writ of certiorari in United States v. Ortiz, No. 73-2050. In that case, the Ninth Circuit held, on the authority of its decision in the present case, that evidence seized in a checkpoint search conducted after the decision in Almeida-Sanchez must be suppressed.

We believe that it would be appropriate to defer disposition of the present petition pending action on the petition in Ortiz. If the Court denies the petition in Ortiz,

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3/ (footnote cont'd)

The Fifth Circuit has not clearly decided whether Almeida-Sanchez requires warrants for checkpoint searches, but it has held, in agreement with the Ninth Circuit, that any pre-Almeida-Sanchez searches would, in any event, be unaffected. United States v. Nocla, 493 F.2d 910; United States v. Cook, 492 F.2d 744; United States v. Hufstetler, C.A. 5, No. 73-2927, decided July 3, 1974.

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the present case would be an alternative vehicle for review of the first question presented in that petition -- whether Almeida-Sanchez applies to checkpoint searches. If the Court grants the petition in Ortiz and agrees with our contention that warrants are not required for checkpoint searches, then the judgment in the present case would be correct, albeit for reasons other than those relied on by the court of appeals, and the present petition should be denied after Ortiz is decided.

If the Court grants the petition in Ortiz but disagrees with our contention on the checkpoint issue, then it would reach the second issue presented in that petition -- whether the decision of the court of appeals in the present case constitutes a new rule which should be applied in the Ninth Circuit only to checkpoint searches that occurred after the date of the decision in this case. The Court's resolution of that issue in Ortiz may affect the proper disposition of petitioner's retroactivity contentions in the present case. If, for example, the Court agrees with our position in Ortiz that the court of appeals' ruling in the present case announced a "new rule" for retroactivity purposes, then there may be merit to petitioner's claim that he should benefit from that new rule as the litigant whose case served as the vehicle for the Ninth Circuit's extension of Almeida-Sanchez to checkpoint searches. See Stovall v. Denno, 388 U.S. 293. In that event, it might be appropriate to grant the present petition and remand the case for further consideration in light of this Court's decision in Ortiz.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

AUGUST 1974.